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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT GAFFIN,

Defendant and Appellant.

E047538

(Super.Ct.No. FWV801062)

OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller,
Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Following a jury trial, defendant Robert Gaffin, IV, was convicted of possessing

marijuana for sale (Health & Saf. Code, § 11359), and was placed on formal probation for three years.

BACKGROUND

On March 5, 2008, a man was at a gas station with an AM/PM mini-mart in Rancho Cucamonga. As he refueled his vehicle, he saw two men exit a red pickup truck and look from side to side. Approximately 20 seconds later, a turquoise Honda Accord pulled up and parked to the right of the pickup truck. The driver of the red pickup truck walked to the driver's side of the turquoise Honda and had a short conversation through the car window. The driver of the pickup leaned into the window, pulled something that resembled money out of his pocket and transferred it to the person in the Honda. The driver of the pickup then returned to his vehicle. The driver of the turquoise Honda walked back to the rear of his vehicle, opened the trunk, pulled out a one-gallon size Ziploc freezer bag. The freezer bag contained three pill containers. The Honda driver then took out some of the pill containers and poured some items in his hand, then zipped the bag, put the Ziploc bag back into the trunk, closed the trunk, and walked to the passenger side of the red pickup truck. The Honda driver handed the pickup occupants whatever was in his hand.

The man who observed this transaction called 911 to report the suspicious activity. The information was relayed to a police sergeant who responded to the location, where he observed a turquoise sedan. Defendant was in the driver's seat with the door open. The red truck was gone.

The officer approached the turquoise sedan on the driver's side and asked how he was doing. The defendant made a quick movement, reached for a bag and shoved it under the seat. Not knowing what he was reaching for, the officer drew his weapon, commanded defendant to stop and show his hands. Then the officer asked defendant to exit the vehicle. The officer could smell marijuana before he entered the vehicle. Under the driver's side seat, the officer found a plastic shopping bag that the officer had seen defendant place under the seat. Inside the shopping bag were three pill bottles, containing what appeared to be marijuana, a small plastic bag of marijuana and some cash. Marijuana is regularly stored in pill bottles. The officer searched defendant but found no indicia of personal use, such as pipes or rolling papers. The substances found in the containers in the car were tested and found to be marijuana, having a net weight of 7.24 grams.

Back up arrived shortly. The backup officer found a wallet in the vehicle containing \$304, mostly in \$20 dollar bills. He also looked inside the pill vials. One vial contained a significant quantity of marijuana, while the other two had only residue. After the evidence was photographed, the pill vials were discarded.

Based on the manner in which the marijuana was packaged, as well as the quantity of money found, and the observations made by the individual who made the 911 call, the officer believed defendant purchased the marijuana for sale.

Defendant denied any drug transaction occurred. He explained that he pulled into the gas station parking lot to clean out his car because he needed to take family members to the hospital to visit his sick grandmother. He was also on his way to pay his phone bill

which was delinquent. He parked in the back because the gas station was very busy. He opened the trunk to get a shopping bag to use for trash. There was dirt in the trunk area from flowers he had taken to the hospital for his grandmother that had spilled. There was also a black duffle bag. Defendant did not know whose bag it was but assumed it was left by a family member he had taken to the airport. He looked inside the duffle bag and found a PlayStation, as well as a clear plastic freezer bag that contained three blue pill bottles.

Defendant took the pill containers inside his car to get a better look and see if they were really a prescription. The label said it was for medical marijuana, and the prescription was for a person named Mohammed Ali, a person defendant had taken to the Metro station a few days earlier. About that time, someone parked in a vehicle approximately 40 feet away called defendant by name. Defendant told the person to hold on, and put the plastic bag under the seat. Then he exited the vehicle and contacted his friend midway between the two vehicles. Defendant's hands were empty. Another friend of defendant's was the driver of the truck, and he was in the AM/PM store at this time. After a short conversation, defendant's friend said they had to go to work and they left.

Defendant was charged with one count of possessing marijuana for the purpose of sale. (Health & Saf. Code, § 11359.) He made motions to dismiss the information (Pen. Code, § 995), to suppress evidence (Pen. Code, § 1538.5), and to disclose the identity of

the informant, which were denied.¹ After a trial by jury, defendant was convicted as charged. Defendant was placed on formal probation, and he appealed.

DISCUSSION

Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493] setting forth a statement of the case, a summary of the facts, and potential arguable issues, and requesting that we undertake an independent review of the entire record. We offered defendant an opportunity to file a personal supplemental brief. He filed a petition for writ of habeas corpus raising various challenges to the trial court's denial of his motion to suppress evidence (Pen. Code, § 1538.5), which we treat as a supplemental brief. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error.

First, the denial of the motion to suppress evidence (Pen. Code, § 1538.5) was proper. Probable cause based on an informant's tip is evaluated under a "totality of the circumstances" test. (*Illinois v. Gates* (1983) 462 U.S. 213, 230 [103 S.Ct. 2317, 76 L.Ed.2d 527, 543].) Private citizens who are witnesses to a criminal act, absent some circumstances casting doubt upon their information, are considered reliable. (*People v. Brueckner* (1990) 223 Cal.App.3d 1500, 1504.) An anonymous tip, suitably corroborated, exhibits sufficient indicia of reliability to provide reasonable suspicion to make an investigatory stop. (*People v. Coulombe* (2000) 86 Cal.App.4th 52, 57.)

¹ However, the citizen informant who called 911 testified at trial.

Here, the tip was not anonymous. Also, the informant described two vehicles by color and make, a turquoise Honda and a red Nissan pickup truck, as well as a bag containing three pill containers. When the officer arrived at the location, the turquoise Honda was still present, corroborating the information provided by the citizen who called 911. When the officer observed defendant put something under his seat, the officer was justified in ordering defendant out of the car and investigating the circumstances. As he approached the vehicle, he smelled marijuana. The totality of these circumstances justified the detention of defendant and the search of the car.

We also independently reviewed the record to determine if defendant's due process rights were violated when another officer destroyed or discarded the pill vials. Law enforcement agencies have a duty to preserve evidence that might be expected to play a significant role in a suspect's defense. (*California v. Trombetta* (1984) 467 U.S. 479, 488 [104 S.Ct. 2528, 81 L.Ed.2d 413].) For this duty to arise, the evidence must have an exculpatory value that was apparent before the evidence was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (*People v. Carter* (2005) 36 Cal.4th 1215, 1246.) Where the defendant claims that the destruction of evidence precluded him or her from subjecting it to tests, defendant must show that the results of such tests might have exonerated him or her. (*Ibid.*) After reviewing the record, there is no indication that any testing of the marijuana vials would have exonerated defendant.

We have completed our independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Miller
J.